

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

GREGORY DAVID WERBER,

Petitioner,

v.

RESIDENTIAL REENTRY MANAGER,  
Residential Reentry Management, Seattle  
Field Office, Federal Bureau of Prisons,

Respondent.

CASE NO. 2:22-cv-01066-TL

ORDER

This matter comes before the Court on the Report and Recommendation of United States Magistrate Judge S. Kate Vaughan (Dkt. No. 24) and Petitioner's Objections to the Report and Recommendation (Dkt. No. 25). Having reviewed the Report and Recommendation, Mr. Werber's objections, and the remaining record, the Court ADOPTS the Report and Recommendation and OVERRULES the objections.

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**I. FACTUAL BACKGROUND**

Mr. Werber’s petition challenges the computation of his sentence under the First Step Act of 2018, 18 U.S.C. § 3632(d)(4) (“FSA”). The Court will not repeat the history of the First Step Act or the Bureau of Prisons (“BOP”) grievance procedure which are detailed in the Report and Recommendation. Dkt. No. 24 at 3–6.

BOP records show that Mr. Werber has previously filed administrative grievances. Dkt. No. 14-1 at 3. Between July and September 2021, Mr. Werber filed a number of grievances or appeals related to sentence computations in which he claimed he was entitled to time credit on a sentence. *Id.* at 5–7, 9, 11–14. For example, on August 30, 2021, Mr. Werber filed a Request for Administrative Remedy asserting

Procedure: Because I did “not receive a response within the time allotted” to my Informal Resolution Request [ ], I “may consider the absence of a response to be a denial at that level,” and proceed with this Request for Administrative Remedy, pursuant to 28 CFR § 542.18.

Complaint: I am overdue for release and should be immediately released because my current federal sentence [ ] should be credited with the excess time I served on my prior federal sentence [ ], pursuant to Goldstein v. U.S. Parole Comm’n and Warden, FCI Lompoc, 90 F.Supp. 1505 (C.D. Cal., 1996), as thoroughly set forth in my letter to the Designation and Sentence Computation Center (“DSCC”), dated July 20, 2021 [ ].

I request my sentence be credited pursuant to Goldstein, *Supra.*, and that I be immediately released.

*Id.* at 9.

In his objections, Mr. Werber explains that on January 20, 2022, BOP performed a manual calculation of FSA time credits for him and calculated that he had 76 days of FSA time credits. Dkt. No. 25 at 3, n.3. Mr. Werber also cites to documents attached to his response to Respondent’s Motion to Dismiss that show: (1) on February 10, 2022, Mr. Werber asked to be provided his latest sentence computation showing his “‘First Step Act’ credits, release date, etc.” (Dkt. No. 25 at 3, n.3 (citing Dkt. No. 15-1 at 56)); (2) Mr. Werber was informed on February

1 17, 2022, that “Your original projected release date was: 1/17/23 but with the 76 days of FSA  
2 credits it is now: 11/2/22 . . .” (*id.*); (3) on April 10, 2022, Mr. Werber made another request for  
3 “a print out of my ‘First Step Act’ credits” (Dkt. No. 15-1 at 58); and (4) BOP informed Mr.  
4 Werber on April 12, 2022, that “[a]ccording to your computation data sheet you had 76 days of  
5 FTC applied. Your original PRD was 1/17/23 and now it is 11/2/22 via FSA release.” (*id.*). On  
6 May 9, 2022, Mr. Werber submitted a grievance requesting immediate release to a residential  
7 reentry center placement. Dkt. No. 14-1 at 3, 6. He was transferred to a residential reentry center  
8 on June 6, 2022, less than one month later. Dkt. No. 1 ¶ 9.c. Mr. Werber was transferred to home  
9 confinement on July 13, 2022. *Id.* ¶ 9.d.

## 10 II. LEGAL STANDARD

11 A district court has jurisdiction to review a magistrate judge's report and recommendation  
12 on dispositive matters. *See* Fed. R. Civ. P. 72(b). The district court “shall make a de novo  
13 determination of those portions of the report or specified proposed findings or recommendations  
14 to which objection is made.” 28 U.S.C. § 636(b)(1); *see also* Fed. R. Civ. P. 72(b)(3) (stating the  
15 Court “must determine de novo any part of the magistrate judge’s disposition that has been  
16 properly objected to”). “The district judge may accept, reject, or modify the recommended  
17 disposition; receive further evidence; or return the matter to the magistrate judge with  
18 instructions.” Fed. R. Civ. P. 72(b)(3); *accord* 28 U.S.C. § 636(b)(1). A party properly objects  
19 when the party files “specific written objections” to the report and recommendation as required  
20 under Federal Rule of Civil Procedure 72(b)(2). Mr. Werber timely filed objections.

## 21 III. DISCUSSION

22 The majority of Mr. Werber’s objections detail his dispute with the way BOP calculated  
23 his FSA credits and lays out in detail his basis for his calculations. Mr. Werber asserts that if the  
24 BOP had properly computed his sentence under the FSA, he would be due 112 days of sentence

1 credits, so that his term of imprisonment would have ended—and his term of supervised release  
2 would have begun—on July 9, 2022. Dkt. No. 25 at 1–2. BOP calculated that Mr. Werber had 76  
3 days of FSA credits (Dkt 14 at 6) and details the factual issues missing from the record to  
4 determine the accuracy of Mr. Weber’s claim. Dkt. No. 17 at 10. Mr. Werber, as the petitioner,  
5 bears the burden of demonstrating that he is entitled to habeas relief under § 2241. *Walker v.*  
6 *Johnston*, 312 U.S. 274, 286-287; *Lambert v. Blodgett*, 393 F.3d 942, 970 n.16 (9th Cir. 2004).

7 But before getting to the calculation issue, the first hurdle Mr. Werber must clear is  
8 whether he exhausted his administrative remedies. “[A]s a prudential matter, [courts require] that  
9 habeas petitioners exhaust all available judicial and administrative remedies before seeking relief  
10 under § 2241.” *Laing v. Ashcroft*, 370 F.3d 994, 997 (9th Cir. 2004). Where the BOP has  
11 jurisdiction to provide time credit, a petitioner must exhaust his administrative remedies pursuant  
12 to the BOP procedures found at 28 C.F.R. §§ 542.10–16 prior to filing a habeas petition.  
13 *Alexander v. Taylor*, 21 F.3d 1111 (9th Cir. 1994). *See also Pinson v. Von Blanckensee*, No. 21-  
14 16138, 2022 WL 2256323, at \*1 (9th Cir. June 23, 2022). However, the requirement that federal  
15 prisoners exhaust administrative remedies before filing a habeas corpus petition is not a statutory  
16 requirement but, rather, is judicially created. *Brown v. Rison*, 895 F.2d 533, 535 (9th Cir. 1990).  
17 Therefore, the exhaustion requirement is prudential not jurisdictional, and courts have discretion  
18 to waive a prudential requirement. *Laing*, 370 F.3d at 998.

19 Mr. Werber asserts that “the classic case for waiving administrative remedies is when, as  
20 here, a release date has passed,” citing *Butler v. Bradley*, No. 20-cv-11211, 2021 WL 945252, at  
21 \*1 (C.D. Cal. Feb. 22, 2021), *report and recommendation adopted*, No. 20-cv-11211, 2021 WL  
22 5596151 (C.D. Cal. Nov. 30, 2021), and *Miller v. Thomas*, 2008 WL 4793035, at \*3 (D. Or. Oct.  
23 31, 2008), in support of his argument. Dkt. No. 25 at 7. The R&R explains why *Butler* is  
24

1 inapplicable.<sup>1</sup> Dkt. No. 24 at 8–9. But in addition, Mr. Butler at least made efforts to exhaust his  
2 administrative remedies beginning six months prior to the date he believed he should be released.  
3 2021 WL 945252, at \*2.

4 In contrast, here Mr. Werber made no effort to address the issue with BOP until he filed  
5 his habeas petition, several weeks after the date he believed his term of imprisonment should  
6 have ended, even though he was on notice of BOP’s calculations as early as February 17, 2022  
7 (over four months prior to the date he believed his imprisonment should end).<sup>2</sup> See *supra* § I. Mr.  
8 Werber was clearly familiar with the BOP’s grievance procedure, knew how to access the  
9 procedure, understood the time frames to receive responses, and had successfully utilized the  
10 procedure. Yet, he only asked to be provided with the estimated FSA credit computation and did  
11 not raise his disagreement with the calculation through the grievance process at all, instead  
12 raising his dispute in his Petition for Writ of Habeas Corpus which he filed on August 1, 2022. In  
13 assessing whether to waive a prudential exhaustion requirement, whether “‘relaxation of the  
14 requirement would encourage the deliberate bypass of the administrative scheme’ is a key  
15 consideration.” *Laing*, 370 F.3d at 1000. Allowing a petitioner to sit back, do nothing, and wait  
16 until a release date has passed to create a futility argument would encourage the deliberate  
17 bypass of the administrative scheme.

18 Nor does Mr. Werber’s argument that FSA credits do not vest until the day of release  
19 justify waiving the exhaustion requirement. As the documents attached to Mr. Werber’s response  
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21 <sup>1</sup> The Report and Recommendation also addresses why most of the cases Mr. Werber re-raises in his objection also  
22 do not advance his position given the facts in this case. Mr. Werber also raises a new case, *Miller*, in his objection.  
In *Miller*, the magistrate judge was effectuating the specific intent with regard to Mr. Miller’s sentence expressed by  
the district court judge at his sentencing, 2008 WL 4793035, at \*5, a situation that does not apply in this case.

23 <sup>2</sup> Mr. Werber asserts that he “successfully participated” in programs in 2021 (Dkt. No. 15 at 9), and he should have  
24 had 103.5 days of earned time credit by January 20, 2022 (*id.* at 12). But BOP informed him on February 17, 2022,  
that it believed he had only 76 days of credit.

1 to Respondent's Motion to Dismiss demonstrate, the calculations are done months in advance,  
2 and Mr. Werber was aware of this fact. *See* Dkt. No. 15-1.

3 Mr. Werber's objections go into more detail about the reasons he believes he should  
4 receive the additional FSA time credits. Dkt. No. 25 at 9–23. But the Report and  
5 Recommendation ably explained the issues with the factual record. Dkt. No. 24 at 9–12. Further,  
6 Mr. Werber's argument that he believes an evidentiary hearing is needed only highlights why  
7 administrative remedies must first be exhausted. As the Ninth Circuit stated in *Chua Han Mow v.*  
8 *United States*, 730 F.2d 1308 (9th Cir. 1984):

9 In this case, Chua has not exhausted his administrative remedies. The Bureau of  
10 Prisons has established an Administrative Remedy Procedure through which an  
11 inmate can seek formal review of a complaint which relates to any aspect of his  
12 imprisonment. 28 C.F.R. §§ 542.10–542.16 (1981). This is exactly the type of case  
13 in which exhaustion of administrative remedies should be required. There has not  
14 been the development of a factual record which would enable this court to review  
15 the Bureau's decision. Chua himself states that there are disputed factual assertions  
16 when he argues that there should have been an evidentiary hearing in the court  
17 below. The district court properly refused to consider this issue.

18 730 F.2d at 1313–14. Requiring the exhaustion of remedies aids judicial review by allowing the  
19 appropriate development of a factual record in an expert forum. *Id.* at 1313.

20 Finally, Mr. Werber asserts that he should have been allowed to file a surreply because  
21 28 U.S.C. § 2243 allows a petition to deny any of the facts set forth in the return, and if  
22 allegations in a return are not traversed, they are accepted as true pursuant to 28 U.S.C. § 2248.  
23 Dkt. No. 25 at 23. However, Mr. Werber filed a response to the return. Dkt. No. 15. Further,  
24 Local Civil Rule 7(g) specifies that the purpose of a surreply is “for requests to strike material  
contained in or attached to a reply brief.” The Court finds no error in Judge Vaughan's striking  
of Mr. Werber's surreply.

**IV. CONCLUSION**

For the foregoing reasons, the Court hereby ORDERS that:

- (1) The Court ADOPTS the Report and Recommendation;
- (2) Petitioner's objections are OVERRULED;
- (3) Petitioner's § 2241 Petition for Writ of Habeas Corpus (Dkt. No. 1) is DENIED without an evidentiary hearing;
- (4) This action is DISMISSED without prejudice; and
- (5) The Clerk is directed to send copies of this Order to the parties and to Judge Vaughan.

Dated this 13th day of June 2023.

  
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Tana Lin  
United States District Judge